A **MEXALAND DEVELOPMENT SDN BHD**

v.

SCORE OPTION SDN BHD

B COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
SULONG MATJERAIE JCA
KANG HWEE GEE JCA
[CIVIL APPEAL NO: W-02-736-2007]
C 19 MAY 2010

LAND LAW: *Caveat - Caveatable interest - Whether appellants had caveatable interest in project land - Factors to consider - Appellants lodging a caveat on the project land - Whether appellants came within provisions* D *of s. 323(1) of the NLC - Evidence adduced by the parties - Effect of - National Land Code, s. 323(1)(a)*

LAND LAW: *Caveat - Effect - Purpose of a caveat - Appellants filing an application to extend the caveat - Whether appellants application* E *correctly made - Factors to consider - Whether appellants had registrable interest in the project land - National Land Code, s. 326(2)*

LAND LAW: *Registrar of Title - Function of - Whether administrative in nature - Whether the Registrar retains the discretion to decide whether the private caveat remains on the register where provisions of the NLC* F *are complied with - National Land Code, s. 322(1)(a)*

LAND LAW: *Caveat - Caveat interest - Whether appellants had caveatable interest on project land - Entry and removal of caveat - Requirements that need to be fulfilled - Whether clause in the JVPM* G *agreement conferred a caveatable interest on appellants - Whether appellants' interest merely monetary in nature - Effect of - National Land Code, ss. 323, 326 & 327*

LAND LAW: *Caveat - Effect - Extension of - Whether caveat should remain on the register document of titles - Test to be applied - Effect of* H *- Whether satisfied by appellants - Effect of - National Land Code, s. 323(1)*

CIVIL PROCEDURE: *Judgments and orders - Binding effect - Principle of stare decisis - Meaning of - Whether to be adhered to -* I *Reasons for the same - Effect of*

CIVIL PROCEDURE: *Appeal - Appeal against decision of High Court - Respondents taken over by Receivers and Managers - Whether Receivers and Managers bound by terms of JVPM - Effect of - Whether it made the appeal purely academic*

By way of a Joint Venture Cum Project Management Agreement dated 22 February 2006 ('JVPM agreement') entered into between the respondent as the landowner and the second defendant (Austral Development Sdn Bhd (formerly known as Mexaland Sdn Bhd)) as the developer, the appellant had been appointed as the project manager to develop part of the respondents' land measuring approximately 45.14 acres situated in Puchong, Selangor and comprised in H.S.D 112510 PT No: 2063, Mukim and District of Petaling, State of Selangor ('project land'). The appellant was conferred legal and physical possession of the project land and was given exclusive rights to manage the development of it. Whilst the works were being carried out on the project land, the appellant encountered problems, allegedly due to fundamental breaches committed by the respondent and the second defendant in respect of the terms and conditions of the JVPM agreement. The appellants outlined the breaches committed by the respondent and the second defendant by way of letter and demanded that they remedy the same. The appellants presented and registered a private caveat against the project land pursuant to cl. 6.1 of the JVPM agreement. The respondents and the second defendants' breaches continued notwithstanding the appellants demand for rectification. The respondent then terminated the JVPM agreement. The appellants averred that the termination had been done in bad faith. The appellants together with the second plaintiff then filed a suit against the respondent and the second and third defendants. In May 2007, the appellants received a notice of intended removal of private caveat issued by the Registrar of Title, Selangor stating that the respondent had applied to remove the private caveat. The appellant resisted by filing an *ex parte* application by way of summons in chambers and sought an extension of the private caveat from the High Court. The High Court dismissed the appellant's *ex parte* application to extend the entry of the private caveat. The appellants now appealed against the said decision.

Held (allowing the appeal with costs)
Per Kang Hwee Gee JCA delivering the majority judgment of the court:

(1) The appellant in the instant case had not been claiming title to the land but merely an interest under the JVPM agreement. Section 323 of the NLC had made it clear that only a "registrable interest" could sustain a caveat (*Trans-Summit Sdn Bhd v. Chun Nyook Lin*; *Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor &Another Appeal*) The rather narrow construction that had been adopted by our higher courts with respect to "registrable interests" was to be expected. A caveat had been intended to protect the Torrens System of registration in dealing with land under the NLC and had been meant only to serve and facilitate that purpose. The appellants in the instant case had claimed that they had fallen under the ambit of the words "any right to such title or interest" as provided under s. 323(1)(a) of the NLC. As to what had constituted "any right to such title and interest", the passage from *Judith Simhombing The National Code: A Commentary* was accepted (Issue 21, at p. XXV 486) as correctly stating the law. (paras 90, 91, 96 & 97)

(2) Where a caveat had been entered in Form 19B based on a right to a joint venture agreement, as in the present case, in an application to extend the caveat under s. 326(2) of the NLC, it was necessary to examine that agreement in detail and question whether the JVPM agreement relied upon by the appellants to caveat the land had been sufficient to confer upon the appellant the right to a registrable interest in the land or any part thereof. The JVPM agreement had disclosed that for the consideration as stated in cl. 4, the appellants had been given physical possession of the land and a free hand to develop, manage and sell the property in accordance with the terms stipulated therein. It was clear that the appellants *vide* the JVPM agreement had acquired the rights which although had not in its present form been capable of causing a substantive entry on the register, had nevertheless entitled them to claim a "right to such title or interest" in a portion of the respondent's land and had given them a right to "otherwise deal with all of the Units at any time". In short, the appellant could at its option acquire a direct proprietary interest or title in any or all of the units by paying the prevailing market value for each unit. Thus the right the

appellants had acquired had not merely been a right to the profits of the development but had been a legitimate registrable interest in the land which it could lawfully caveat. (paras 98, 99 & 101)

(3) The joint venture agreement which had spelt out the caveator's entitlement to the subdivided lots as opposed to merely allowing him to share in the profits of the development had to be considered in a different light. The purpose or object underlying the NLC would be better served by construing "registrable interest" in s. 323(1)(a) to encompass all interests acquired by the caveator "capable of potential registration". The purpose of the NLC had been to provide an orderly means of transfer of land or an interest in land by the process of registration. A liberal construction would allow converted or subdivided lands in a development to be registered by an ultimate purchaser. A narrow and restrictive construction on the other hand would impede the means by which property were acquired in a housing development by buyers at large. (paras 104 & 107)

Per Abdul Malik Ishak JCA (dissenting):

(1) The role of the Registrar in entering a private caveat is administrative and the word "may" that appear in s. 322(1)(a) of the NLC should read as "shall". Thus the Registrar has no discretion whatsoever in respect of an application which complies with the requirements of the NLC as it is the court that will ultimately determine whether or not the private caveat can remain on the register. Once the private caveat is entered, it acts as a temporary injunction to prevent dealings from being registered and it serves to prevent a lien-holders caveat from being entered. The Registrar does not have the quasi-judicial role to play in either the entry or retention of the private caveat as that role belongs to the court. (paras 24 & 26)

(2) Persons or bodies who wish to enter a private caveat must have a caveatable interest in the land. A personal claim which is enforceable only against the registered proprietor but not the land in question, cannot be caveated. Only claims to interests which have been held to be entitled to caveat would include those which represent claims to "title to, or any registrable interest in the alienated land" or claims "to any

right to such title or interest". Section 326 of the NLC allows the registered proprietor of the land or interest to apply to the Registrar for removal of the private caveat whilst s. 327 allows a "person aggrieved" by the existence of the private caveat to apply to the court for its removal. Herein, the respondent as the registered proprietor of the land had applied to the Registrar to remove the private caveat under s. 326 of the NLC who in turn had served the appellant a notice of intended removal in Form 19C. Upon receipt of Form 19C, the appellant had applied *ex parte* to the learned High Court Judge to extend the private caveat on the project land, which was refused. In seeking to extend the private caveat, the appellant had proceeded under s. 326(2) of the NLC. The JVPM agreement looked at in isolation had not conferred on the appellants any caveatable interest on the land. The appellants' claim in the civil suit had revolved around damages arising purportedly out of the alleged breaches of the terms and conditions of the JVPM and specific performance of the JVPM agreement. In seeking for an order for specific performance, the appellant had clearly shown its intention to proceed with the development of the project land and its interest in continuing with the JVPM had been centred on the profits to be gained from the development. The appellants had sought monetary compensation in its civil suit and everything had revolved around money. (paras 32-35, 41, 42, 52, 50 & 53)

(3) The existence of a clause in the JVPM agreement which had allowed for the entry of a private caveat had not by itself conferred a caveatable interest. *Zemine*'s case had been decided without taking into account the case of *Perbadanan Setiausaha Kerajaan Selangor & Ors* and the Federal Court case of *Wong Kuan Tan*. The decision of the Federal Court carried with it the doctrine of precedent or of *stare decisis*. The decision of a higher court acted as binding authority on a lower court. (paras 61, 68 & 69)

(4) In considering whether a private caveat should remain on the register document of title or be removed, the appellant caveator must pass the three stages on inquiry: (i) whether the appellant caveator had disclosed a caveatable interest in its application under s. 323(1) of the NLC, (ii) if a caveatable interest was established, whether the evidence produced in court in support of its claim disclosed a serious question to be

tried and (iii) if both questions above were answered in the affirmative, whether the balance of convenience or justice lay in favour of the private caveat remaining on the register pending the disposal of the suit. In this case, the existence of cl. 6.1 of the JVPM agreement had not conferred any caveatable interest on the appellant and accordingly, having failed the first stage of the test as propounded above, the other two stages of the test had not been necessary to consider. Further, the court had been unable to consider stage two of the test as the respondent had been deprived of an opportunity to file an affidavit in reply. (paras 76, 77 & 78)

(5) Receivers and managers had been appointed for the respondent and the JVPM agreement had certainly not bound them. That being the case, the appellant's appeal herein and the civil suit at the High Court would be rendered academic. (para 79)

Bahasa Malaysia *Translation Of Headnotes*

Melalui suatu Perjanjian Usahasama dan Pengurusan Projek bertarikh 22 Febuari 2006 ('JVPM') yang ditandatangani antara pihak responden sebagai tuanpunya tanah dan defendan kedua (Austral Development Sdn Bhd (dahulunya dikenali sebagai Mexaland Sdn Bhd)) sebagai pemaju, pihak perayu telah dilantik sebagai pengurus projek sebahagian tanah responden berukuran lebih kurang 45.14 ekar yang terletak di Puchong, Selangor di bawah H.S.D 112510 PT No: 2063, Mukim dan Daerah Petaling, Selangor ('tanah projek'), untuk dimajukan. Pihak perayu telah diberikan milikan tanah projek tersebut secara fisikal serta hak ekslusif mengikut undang-undang untuk memajukan tanah projek tersebut. Semasa kerja sedang dilaksanakan atas tanah projek tersebut, perayu telah mengalami masalah yang diperkatakan telah disebabkan oleh kemungkiran terma dan syarat JVPM tersebut oleh pihak responden dan defendan kedua. Pihak perayu telah memberitahu pihak responden dan defendan kedua mengenai kemungkiran tersebut melalui sepucuk surat dan menuntut mereka memperbetulkannya. Pihak perayu telah mengemukakan dan mendaftar kaveat persendirian ke atas tanah projek tersebut mengikut kl. 6.1 JVPM tersebut. Kemungkiran pihak responden dan defendan kedua masih berterusan walaupun tindakan pembetulan dituntut oleh perayu. Responden kemudiannya telah menamatkan perjanjian JVPM tersebut. Pihak perayu berpendapat

bahawa penamatan tersebut telah dilakukan dengan niat jahat. Pihak perayu bersama-sama dengan plaintif kedua telah memfailkan suatu tindakan terhadap responden, defendan kedua dan defendan ketiga. Pada bulan Mei 2007, pihak perayu telah menerima suatu notis daripada Pendaftar Hakmilik Selangor memberitahu mereka bahawa pihak responden telah memohon untuk membatalkan kaveat persendirian pihak perayu dan bahawa kaveat tersebut akan dibatalkan. Pihak perayu telah memfailkan suatu permohonan *ex parte* melalui Saman Dalam Kamar di mana mereka memohon perlanjutan kaveat persendirian tersebut daripada Mahkamah Tinggi. Mahkamah Tinggi telah menolak permohonan *ex parte* pihak perayu dan pihak perayu kini merayu terhadap keputusan Mahkamah Tinggi tersebut.

Diputuskan (membenarkan rayuan dengan kos)

Oleh Kang Hwee Gee HMR menyampaikan penghakiman majoriti mahkamah:

(1) Perayu di dalam kes ini tidak menuntut hakmilik kepada tanah malahan cuma menuntut kepentingan di bawah perjanjian JVPM tersebut. Seksyen 323 NLC menjadikannya jelas bahawa hanya suatu kepentingan yang "registrable" atau yang boleh didaftar boleh mempertahankan atau menyokong suatu kaveat. Maka Hakim di Mahkamah Tinggi terpaksa mengikut keputusan Mahkamah ini di dalam kes *Trans-Summit Sdn Bhd v. Chun Nyook Lin*; *Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor & Another Appeal*. Pentafsiran sempit yang digunakan oleh mahkamah-mahkamah yang lebih tinggi berkenaan dengan kepentingan yang boleh didaftar atau "registrable interests" adalah dijangkakan. Suatu kaveat bertujuan untuk melindungi system pendaftaran Torrens dalam menjalankan urusniaga berkenaan tanah di bawah NLC dan ia hanya bertujuan untuk memudahkan proses tersebut. Perayu di dalam kes ini telah mendakwa bahawa mereka telah jatuh di bawah linkungan "any right to such title or interest" sepertimana diperuntukkan di bawah s. 323(1)(a) NLC. Berkenaan apa yang terdiri daripada "any right to such title or interest", kutipan pendek Judith Simhombing *The National Code: A Commentary* (Issue 21, at p. XXV 486) dianggap sebagai pernyataan perundangan yang betul.

(2) Dalam suatu kes di mana kaveat telah dimasukkan melalui Borang 19B berdasarkan hak kepada JVPM, seperti di dalam kes ini, suatu permohonan untuk melanjutkan kaveat di bawah

s. 326(2) NLC adalah perlu untuk meneliti perjanjian JVPM tersebut secara mendalam dan untuk menyoal sama ada perjanjian JVPM tersebut yang disandarkan oleh perayu untuk mengkaveat tanah projek tersebut adalah mencukupi untuk memberikan pihak perayu hak kepada kepentingan yang boleh didaftar ke atas tanah projek tersebut atau mana-mana bahagian daripadanya. Perjanjian JVPM tersebut telah menunjukkan bahawa untuk balasan sepertimana yang diperuntukkan dalam kl. 4 tersebut, perayu telah diberikan milikan secara fisikal tanah projek tersebut dan kebebasan untuk membangunkan, menguruskan dan menjual hartanah tersebut mengikut terma dan syarat yang dinyatakan di dalamnya. Pihak perayu melalui JVPM tersebut telah memperolehi hak yang walaupun bukan hak untuk kemasukan secara substantif ke atas pendaftar, adalah hak untuk menuntut "right to such title or interest" ke atas sebahagian tanah responden dan hak untuk "otherwise deal with all of the Units at any time". Secara singkat, pihak perayu boleh sekiranya mahu, memperolehi kepentingan tuanpunya atau hakmilik kepada sebarang atau kesemua unit dengan membayar harga pasaran bagi setiap unit. Maka hak yang perayu telah memperolehi bukan sahaja tertakluk kepada keuntungan pembangunan malahan perayu mempunyai kepentingan yang boleh didaftar secara sah ke atas tanah projek tersebut dan mereka berhak mengkaveatnya.

(3) Perjanjian Usahasama yang memperuntukkan hak pengkaveat kepada hartanah yang dibahagikan berbanding dengan hanya memberikannya kebenaran untuk berkongsi di dalam keuntungan tanah yang dibangunkan, harus dipertimbangkan dengan cara yang lain. Tujuan atau objektif di bawah NLC akan lebih bermanfaat sekiranya "registrable interest" dalam s. 323(1)(a) ditafsirkan untuk merangkumi semua kepentingan yang diperolehi oleh pengkaveat "capable of potential registration". Tujuan NLC adalah untuk membolehkan pendaftaran pindahmilik atau kepentingan tanah secara teratur. Suatu pentafsiran secara liberal akan membolehkan pendaftaran tanah yang telah diubahsuai atau dibahagikan dalam suatu pembangunan, kepada pembeli mutakhir. Suatu pentafsiran yang sempit dan terhad pula akan menghalang cara dengan mana hartanah dalam suatu pembangunan perumahan akan diperolehi oleh pembeli secara umum.

Per Abdul Malik Ishak HMR (bertentangan):

(1) Fungsi Pendaftar dalam memasukkan kaveat persendirian adalah suatu fungsi pentadbiran dan perkataan "may" dalam s. 322(1)(a) NLC sepatutnya membaca "shall". Maka Pendaftar tidak mempunyai budibicara berkenaan dengan suatu permohonan yang mematuhi peruntukan-peruntukan NLC dan mahkamahlah yang akhirnya akan memutuskan sama ada kaveat persendirian tersebut boleh kekal di atas Pendaftar. Selepas suatu kaveat persendirian telah dimasukkan, ianya berfungsi sebagai sebagai suatu injunksi sementara untuk menghalang urusan daripada didaftarkan dan ianya menghalang kaveat pemegang lien daripada dimasukkan. Pendaftar tidak mempunyai fungsi kuasi-kehakiman sama ada dalam mengekalkan atau memasukkan kaveat persendirian. Fungsi tersebut adalah milik mahkamah.

(2) Pihak atau badan yang ingin memasukkan kaveat persendirian perlu mempunyai kepentingan "caveatable" ke atas tanah tersebut. Suatu tuntutan persendirian yang hanya boleh dikuatkuasakan terhadap pemilik berdaftar tetapi bukan terhadap tanah berkenaan, tidak boleh dikaveat. Hanya tuntutan kepada kepentingan yang diputuskan mempunyai hak untuk dikaveat akan termasuk tuntutan kepada "title to, or any registrable interest in the alienated land" atau tuntutan kepada "to any right to such title or interest". Seksyen 326 NLC membenarkan pemilik berdaftar tanah atau dengan kepentingan untuk memohon kepada Pendaftar untuk mengeluarkan kaveat persendirian sementara s. 327 membenarkan "person aggrieved" oleh kaveat persendirian itu untuk memohon kepada mahkamah untuk mengeluarkannya. Dalam kes ini, responden sebagai pemilik berdaftar tanah telah memohon kepada Pendaftar untuk mengeluarkan kaveat persendirian tersebut mengikut s. 326 NLC dan Pendaftar pula telah menyerahkan kepada perayu Borang 19C yakni notis berkenaan pengeluaran kaveat. Setelah menerima Borang 19C, perayu telah memohon secara *ex parte* kepada hakim Mahkamah Tinggi untuk melanjutkan kaveat persendirian di atas tanah projek tersebut, yang mana telah ditolak. Dalam usaha untuk melanjutkan kaveat persendirian, perayu telah memohon di bawah s. 326(2) NLC. JVPM tersebut sekiranya dilihat secara berasingan tidak memberikan perayu sebarang kepentingan yang "caveatable" ke

atas tanah. Tuntutan perayu di dalam kes sivil telah bersandarkan gantirugi yang dikatakan telah timbul daripada kemungkiran terma dan syarat perjanjian JVPM dan perlaksanaan spesifik perjanjian JVPM tersebut. Dalam memohon untuk relif perlaksanaan spesifik, perayu telah menunjukkan secara jelas niatnya untuk meneruskan dengan pembangunan tanah projek tersebut dan minatnya untuk meneruskan dengan perjanjian JVPM tersebut telah berpusat kepada keuntungan yang boleh atau bakal diperolehi daripada pembangunan tersebut. Pihak perayu telah memohon gantirugi wang di dalam tindakan sivilnya dan semuanya telah bersandarkan kepada wang sahaja.

(3) Kewujudan klausa dalam perjanjian JVPM yang membolehkan perayu memasukkan kaveat persendirian secara sendiri, tidak memberikan suatu kepentingan yang "caveatable". Kes *Zemine* telah diputuskan tanpa mengambil kira kes *Perbadanan Setiausaha Kerajaan Selangor & Ors* dan kes Mahkamah Persekutuan *Wong Kuan Tan*. Keputusan Mahkamah Persekutuan telah tertakluk kepada doktrin duluan atau *stare decisis*. Keputusan mahkamah yang lebih tinggi bertindak sebagai otoriti mengikatkan mahkamah yang lebih rendah.

(4) Dalam mempertimbangkan sama ada suatu kaveat persendirian harus kekal di atas pendaftar hakmilik tanah atau harus dikeluarkan, perayu pengkaveat harus lulus 3 tahap inkuiri: (i) sama ada perayu pengkaveat telah menunjukkan suatu kepentingan yang "caveatable" di bawah s. 323(1) NLC, (ii) sekiranya suatu kepentingan "caveatable" berjaya ditunjukkan, sama ada keterangan yang dihadapkan di mahkamah untuk menyokong tuntutannya menunjukkan suatu soalan serius yang perlu diputuskan dan (iii) sekiranya kedua-dua soalan di atas dijawab secara positif, sama ada imbangan keselesaan atau keadilan terletak dalam mengekalkan kaveat persendirian tersebut atas pendaftar sementara menunggu kes diputuskan. Dalam kes ini, kl. 6.1 perjanjian JVPM tersebut tidak memberikan sebarang kepentingan yang berkaveat kepada perayu dan memandangkan ujian di tahap pertama sepertimana yang dinyatakan di atas telah gagal, tahap-tahap lain ujian tersebut tidak perlu diputuskan. Selanjutnya, mahkamah tidak dapat mengambil kira tahap dua ujian tersebut kerana responden tidak diberikan peluang untuk memfailkan afidavit jawapannya.

(5) Penerima dan pengurus telah dilantik bagi pihak responden dan perjanjian JVPM tidak mengikat mereka. Maka rayuan perayu yang difailkan di sini dan juga tindakan sivilnya di Mahkamah Tinggi hanya merupakan suatu latihan akademik.

Case(s) referred to:

Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***

Ganding Maju Sdn Bhd v. KS Property Development Sdn Bhd; Affin-ACF Finance Bhd (Intervener) [2008] 7 CLJ 227 HC ***(refd)***

J Raju M Kerpaya @ Jayaraman M Kerpaya v. Kwong Yik Bank Berhad & Anor [1994] 2 CLJ 695 SC ***(refd)***

Kamra Jaya Sdn Bhd v. Mulia Cemerlang Sdn Bhd [2007] 3 CLJ 93 HC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Mohamed Oki & Anor v. Lau Hieng Ming & Ors [1980] 1 LNS 153 ***(refd)***

Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka MRI Murugappa Chettiar, Simati) v. Lee Teck Mook [1995] 2 CLJ 545 CA ***(refd)***

Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1969] 1 LNS 116 FC ***(refd)***

Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor & Another Appeal [2003] 3 CLJ 339 CA ***(refd)***

Registrar of Titles, Johore v. Temenggong Securities Ltd [1976] 1 LNS 135 PC ***(refd)***

SAP Langkawi Development Sdn Bhd lwn. Koperasi Pegawai-Pegawai Tadbir Negeri Kedah Darul Aman Berhad [2009] 1 LNS 571 HC ***(refd)***

Tan Geok Teck & Yang Lain lwn. Upaya Kelana (M) Sdn Bhd [2007] 3 CLJ 312 CA ***(refd)***

Trans-Summit Sdn Bhd v. Chun Nyook Lin (P) [1996] 3 CLJ 502 CA ***(refd)***

Wong Kuan Tan v. Gambut Development Sdn Bhd [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441 FC ***(refd)***

Zemine Development Sdn Bhd v. Hong Kong Realty Sdn Bhd [2009] 5 CLJ 218 CA ***(refd)***

Legislation referred to:

Interpretation Acts 1948 and 1967, s. 17A

Land Code (Cap 81)(Sarawak), ss. 173, 177

National Land Code 1965, ss. 322(1)(a), 323(1)(a), 324(2), 326(2), 327(1), Form 19C

Other source(s) referred to:

David Wong, *Land Tenure in the Malay States*, pp 416-435

Judith Simhombing, *The National Land Code: A Commentary*, Issue 21, p XXV 486

William K Frankena, *Ethics*, 2nd edn, Englewood Cliffs, NJ Prentice - Hall Inc, 1973, p 49

For the appellant - Bruce Lim Cheang Nyok (Rusdy Ishak with him); M/s Lim & Yeoh
For the respondent - TM Eng (Celestina Chin with him); M/s Jal & Lim

[Appeal from High Court, Kuala Lumpur; Suit No: S3-22-496-2007]

[Editor's note: For the High Court judgment, please see Mexaland Development Sdn Bhd & Anor v. Score Option Sdn Bhd & Ors [2008] 8 CLJ 727)

Reported by Sharmini Pillai

JUDGMENT

Abdul Malik Ishak JCA (dissenting):

Introduction

[1] The appellant filed an appeal against the decision of the learned High Court judge given on 16 July 2007 dismissing the appellant's *ex parte* application by way of a summons in chambers dated 2 Julai 2007 wherein the appellant sought for, *inter alia*, an extension of the private caveat registered under presentation number 831/2007 entered by the appellant on 10 January 2007 upon a portion of a piece of land measuring 45.14 acres from the whole piece measuring approximately 200 acres situated in Puchong, Selangor comprised in HS(D) 112510 PT No: 2063, Mukim and District of Petaling, State of Selangor (hereinafter referred to as the "land") pursuant to s. 326(2) of the National Land Code 1965 (hereinafter referred to as the "NLC") until the disposal or final determination of the suit or until such time which the Honourable Court deems fit.

[2] At all material times, the registered proprietor of the land is the respondent.

[3] Since the appellant's application by way of the summons in chambers was made on an *ex parte* basis, the respondent did not have the opportunity to file any affidavit to oppose or to put forth its stand in respect of the appellant's application. It was a one sided affair, so to speak.

Facts Of The Case

[4] The facts as seen from the appellant's affidavit in support of the appellant's application may be stated as follows.

[5] By way of an agreement known as the Joint Venture Cum Project Management Agreement dated 22 February 2006 (hereinafter referred to as the "JVPM agreement") entered between the respondent as the landowner and the second defendant (Austral Development Sdn Bhd (Dahulunya Dikenali Sebagai Mexaland Sdn Bhd) (No: Syarikat: 638830-A)) as the developer, the parties agreed to jointly appoint the appellant as the project manager to develop part of the respondent's land measuring 45.14 acres (hereinafter referred to as the "project land").

[6] It was estimated that the gross development value (hereinafter referred to as the "GDV") of the project land was approximately in the region of RM234,184,000. And that figure was derived from the aggregate sale value of all the buildings to be developed within the project land comprising of two storey terrace houses (118 units), two storey semi-detached houses (70 units), bungalows (98 units), medium, low-medium and low cost apartments (497 units) and three storey shops (84 units).

[7] Both the respondent and the second defendant were entitled by virtue of clause 4.1 of the JVPM agreement to a sum of not less than RM38 million as a profit guarantee or a sum equivalent to the percentages of the GDV of the respective types of buildings in the project land to be constructed, whichever was said to be the highest. The percentages of the GDV were as follows:

Types of building	Percentage of GDV
Semi-detached/linked house/commercial	20%
Medium cost apartment	10%
Low medium cost apartment	8%
Low cost apartment	6%

[8] It was averred that by virtue of cls. 2A.3 and 7B.1(e) and (n) of the JVPM agreement, the appellant was conferred legal and physical possession of the project land and was given exclusive rights to manage the development of the project land.

[9] And as the project manager, the appellant had appointed consultants, engineers, architects and contractors to conduct the preliminary and preparatory development works for the project

land. It was averred that the appellant had so far applied for building plan approvals from Majlis Perbandaran Subang Jaya in respect of the 118 units of two storey terrace houses. The show houses too were almost completed. Up to date, the appellant had already incurred more than RM8 million in costs for the development of the project land.

[10] It was averred that while works were being undertaken at the project land, the appellant encountered problems. The launching date for the sale of the houses on the project land under the JVPM agreement should be on a date not later than 1 June 2006. But the appellant was unable to launch the sale of those houses due to the breaches committed by the respondent and the second defendant of several fundamental terms of the JVPM agreement. It was averred that these breaches had impeded or prevented the launch of the sale of those houses on the project land. It was also averred that the appellant had outlined the breaches committed by both the respondent and the second defendant in a letter dated 16 October 2006 and demanded both of them to remedy the same within fourteen (14) days thereof.

[11] Clause 6.1 of the JVPM agreement was worded in favour of the appellant as the project manager. It was worded in this way (see p. 326 of the appeal record at Jilid 2):

> 6. Private Caveat
>
> 6.1 The Project Manager shall be entitled at the Project Manager's own costs and expenses to present and register a private caveat against the said Land binding only on the Project Land for the purposes of protecting the Project Manager's interest in the Project Land arising from this Agreement prior to the completion or lawful termination of this Agreement Provided That the Project Manager hereby irrevocably agrees and covenants with and undertakes to the Landowner that the Project Manager shall irrevocably agree to the following:
>
> (a) the Landowner's further dealings with the said Land in any manner which does not affect the Project Land including but not limited to further charges, leases, liens, transfer and other dealings permitted under the National Land Code 1965 pertaining to the said Land (excluding the Project Land); and

A (b) the dealings with the said Land and/or the Master Title agreed by the parties under the provisions herein including but not limited to Clause 5 of this Agreement;

and the Project Manager shall within fourteen (14) Business Days of the receipt of the Landowner's notification of any B event stipulated above and upon request thereof, deliver the necessary letter of consent to the Land Office to facilitate the Landowner's proposed dealings with the said Land (subject to the Project Manager's interest in the Project Land) or if the withdrawal of the Project Manager's private caveat is C necessary to facilitate the proposed dealings, the Project Manager shall at its own costs and expenses within the stipulated fourteen (14) Business Days' period lodge the Notice of Withdrawal of Private Caveat with the Land Office Provided Always that the Project Manager shall be entitled to enter another private caveat on the said Land binding D only the Project Land upon the registration of the Landowner's dealings of the said Land.

[12] By cl. 6.1 of the JVPM agreement the appellant as the project manager was entitled to present and register a private E caveat against the project land for the purpose of protecting the appellant's interest as the project manager arising from the JVPM agreement prior to the completion or lawful termination of the JVPM agreement. And so, pursuant to this cl. 6.1, the appellant entered and registered a private caveat on 10 January 2007 against F the project land.

[13] It was averred that the breaches by the respondent and the second defendant continued notwithstanding the demand by the appellant for rectification.

G **[14]** By way of a letter dated 8 February 2006, the respondent terminated the JVPM agreement on the grounds that the appellant had breached the agreement by failing to launch the sale of the houses on the project land by the launching date which was not later than 1 June 2006. The respondent's termination letter H addressed to the appellant dated 8 February 2006 can be seen at pp. 440 to 441 of the appeal record at Jilid 2 and it was worded in this way:

Dear Sirs,

I Re: Termination Of Joint Venture Cum Project Management Agreement Dated 22nd February 2006
Development Of Portion Of Land Held Under HD(D) 112510, PT No. 2063 In The Mukim And Daerah Petaling, Negeri Selangor Darul Ehsan

We refer to the above. A

We regrettably write to inform you that you have defaulted and are in breach of a material term of the agreement namely Clause 12.1.1(a) in failing to launch the sale of the Project by the Launching Date (1/6/2006).

B

In view of the above, we hereby exercised our rights under Clause 12.1.1 to forthwith terminate the above agreement subject to the terms and conditions stated thereunder.

In the circumstances, we shall be much obliged if you could comply with the consequential effect of such lawful termination C and let us assume, take or otherwise enter into possession of the Project Land and take over all buildings, structures and materials thereon and the Project Manager shall in order to permit the Landowner and the Developer to complete the Project handover to the Landowner/Developer all records, plans, approvals, account D books, payment vouchers, receipts, tender documents, letters and whatsoever documents in the custody of the Project Manager relating to the development of the Project and shall have no claims whatsoever against the Landowner/Developer and/or the Project Land and/or the Project within seven (7) days herefrom.

E

As agreed, all monies paid earlier shall be forfeited as agreed liquidated damages.

Meanwhile, we also write to inform you that pursuant to Clause 9.2, the Power of Attorney granted to you earlier is hereby mutually revoked as (a) result of our lawful termination of the F agreement. Kindly let us have the original and copies of the Power of Attorney in order for us to revoke the same.

In the meantime, please be informed that your immediate fulfilment of the above is required failing which we shall hold you G responsible for all adverse consequences arising (including but not limited to recovering from you all losses and/or damages suffered) for non compliance of the same.

We reserve all our rights in the meantime.

H

[15] Four observations must be made in regard to the termination letter. Firstly, the termination was made almost a year after the JVPM agreement was executed. Secondly, the termination was made approximately eight months after the launching of the houses on the project land had elapsed. Thirdly, I the termination was to take effect immediately. Fourthly, there was no prior notice to the appellant nor was there time or opportunity afforded to the appellant to remedy the breaches.

[16] For the appellant, it was averred that the termination was done in bad faith. And that the termination was made at the time when the appellant had already spent more than RM8 million in the project land.

[17] It was further averred that the appellant had objected to the termination by stating that the non-launching of the houses on the project land before the scheduled date due to the breaches of the respondent and the second defendant of the JVPM agreement.

[18] The JVPM agreement contained default clauses of the parties. Clause 12.1.1 of the JVPM agreement was worded in this way (see pp. 337 to 338 of the appeal record at Jilid 2):

> 12. Default Of Parties
>
> 12.1.1. If the Project Manager:
>
> a) fails to launch the sale of the Project by the Launching Date; or
>
> b) shall fail to pay any part of the Landowner's/Developer's Entitlement on the relevant due date(s), and fails for any reason whatsoever to rectify such breach within thirty (30) days from the date of receipt of a written notification from the Landowner/Developer; or
>
> c) if the Project Manager shall go into liquidation whether compulsorily or voluntarily or suffer its goods to be taken in execution or becomes insolvent or compounds or makes arrangements with its creditors or does any act jeopardising in any manner its ability to fulfill its obligation under this Agreement;
>
> d) if the Project Manager fails to complete the construction of all the Buildings together with certificate of fitness and Infrastructure Works on that part of the Project Land within the Project Completion Date or such further extensions as may be mutually agreed upon, from the date of this Agreement or vacant possession of the Project Land is delivered, whichever is the later;
>
> then the Landowner shall be entitled to forthwith terminate this Agreement, whereupon all payments then already received by the Landowner shall be forfeited as agreed liquidated damages, and the Landowner shall also be entitled to assume, take or otherwise enter into possession of the Project Land and takeover all

buildings, structures, and materials thereon and the Project Manager shall, in order to permit the Landowner and the Developer to complete the Project, handover to the Landowner/Developer all records, plans, approvals, account books, payment vouchers, receipts, tender documents, letters and whatsoever documents in the custody of the Project Manager relating to the development of the Project and shall have no claims whatsoever against the Landowner/Developer and/or the Project Land and/or the Project PROVIDED that the Landowner/Developer itself shall not be in material breach of any terms and conditions expressly provided in this Agreement.

[19] While cl. 12.1.2 of the JVPM agreement was worded in this way (see p. 338 of the appeal record at Jilid 2):

12.1.2 Save for the circumstances provided for in Clause 12.1.1 above, the Landowner/Developer shall not be entitled to terminate this Agreement for any other defaults or breaches of this Agreement by the Project Manager but shall be entitled to take such actions as it shall deem fit to enforce the provisions of this Agreement by way of specific performance or injunctions, and/or claim for all losses, damages, costs and expenses as may be suffered by the Landowner/Developer in the event the Project Manager fails to take all action to remedy any breach of this Agreement within fourteen (14) days from the date of receipt of notice from the Landowner/Developer to remedy the same.

[20] The particulars of the purported breaches by the respondent and the second defendant were highlighted by the appellant in a letter dated 16 October 2006 as seen at pp. 427 to 430 of the appeal record at Jilid 2 and, briefly, they may be stated as follows:

(a) Breach of Recital "F" and cl. 3A of the JVPM agreement. This was due to the failure to complete the back-filling and compaction works and to pay the surcharge contractor appointed to undertake the works. And the failure to complete the back-filling and compaction works by the respondent was said to have prevented the launch of the houses on the project land because if the houses were built on the site where compaction works had not been properly carried out, the houses once constructed would sink and crack.

(b) Breach of cl. 7B.1(d) of the JVPM agreement. This was due to the failure to ensure that the conduct of the loans granted by the master chargee namely Malayan Banking Bhd was good and satisfactory.

(c) Breach of cl. 7B.1(h) of the JVPM agreement. This was due to the failure to ensure that the project land was free from encumbrances. The entry of private caveats on the project land and the claims of interest by the previous industrial purchasers had hindered the appellant from launching the houses on the project land.

(d) The technical glitches between the respondent and the second defendant with Glomac Alliance Sdn Bhd that culminated in civil litigation. And during this period, in the course of submitting the amended lay out plan in relation to the Glomac JV agreement, the respondent and the second defendant requested the appellant to hold back the implementation of the works towards the project land by way of a letter dated 26 July 2002.

(e) Breach of cl. 7B.1(u) of the JVPM agreement. This was in relation to the agreement with Glomac to relocate the common facilities area and to share the common utilities costs. And the change in the area of the common facilities would mean an encroachment to the project land and this would in turn fundamentally destroy the concept and marketability of the project land as planned.

[21] On 16 May 2007, the appellant together with the second plaintiff filed a suit against the respondent as well as the second and the third defendants.

[22] On 21 May 2007, the appellant received a notice of intended removal of the private caveat in Form 19C of the NLC issued by the Registrar of Title, Selangor stating that the respondent had applied to remove the private caveat and that the said caveat shall be removed upon the expiry of two months from the date of receipt by the appellant or such further date as ordered by the court. Form 19C of the NLC was dated 23 April 2007 and it can be seen at p. 262 of the appeal record at Jilid 2 and it was worded in this way:

Kanun Tanah Negara
Borang 19C
(Seksyen 326)

Notis Berkenaan Dengan Cadangan Hendak Memotong Kaveat

Kepada Mexaland Development Sdn Bhd

Beralamat di No. 21G & 25-2, Jalan Bandar 14 Pusat Bandar Puchong, Puchong, 47100 Selangor

dan atas permintaannya Kaveat Persendirian No. 831/2007 dimasukkan ke dalam hakmilik bagi tanah yang diperihalkan dalam jadual di bawah ini.

Bahawasanya kaveat di atas adalah dimaksudkan supaya mengikat - tanah itu sendiri yang diperihalkan dalam jadual tersebut,

Dan bahawasanya - Score Option Sdn Bhd

telah membuat permohonan kepada saya supaya kaveat yang tersebut itu dipotong.

Adalah diberi notis bahawa, pada menjalankan kuasa-kuasa yang diberi oleh Seksyen 326 Kanun Tanah Negara, saya akan, apabila habis tempoh dua bulan dari tarikh penyampaian notis ini, atau sesuatu tempoh yang lanjut (jika ada) sebagaimana yang diperintahkan oleh Mahkamah, memotong kaveat itu.

Bertarikh : 23/04/2007

Sgd. Illegible
Aziah Binti Amran
Pendaftar/Pentadbir Tanah
Pejabat Tanah Dan Galian Selangor
Selangor

Jadual Tanah Dan Kepentingan				
Bandar/Mukim /Pekan	No. Lot/PT Petak	Jenis dan No Hakmilik	Bhg Tanah (Jika ada)	No Daftar Pajakan/ Gadaian (Jika ada)
Mukim Petaling	PT 2063	HSD 112510		17550/200 14065/200 14066/200 14067/200.

A **Analysis**

[23] By way of Form 19C of the NLC, the respondent as the landowner was desirous of removing the private caveat entered by the appellant on 10 January 2007 on the project land. The
B appellant resisted by filing an *ex parte* application by way of a summons in chambers dated 2 July 2007 and sought for an extension of the private caveat from the High Court. The learned High Court judge rightly dismissed the appellant's *ex parte* application to extend the entry of the private caveat.

C **[24]** The role of the Registrar in entering the private caveat is administrative and the word "may" that appears in s. 322(1)(a) of the NLC should be read as "shall". Thus, according to Suffian FJ in *Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1969]
D 1 LNS 116, when the Registrar enters the private caveat he "exercises a purely administrative function, ... and that it must grant the application by making the necessary endorsement on the register, ..." The Registrar has no discretion whatsoever in respect of an application which complies with the requirements of
E the NLC because it is the court that will ultimately determine whether or not the private caveat can remain on the register.

[25] Once the application to enter the private caveat is in the prescribed statutory form and that would be in Form 19B, and the application and the accompanying statutory declaration
F discloses an interest capable of being caveated under s. 323 of the NLC, the Registrar has no choice but is obliged to enter the private caveat by endorsement pursuant to s. 324(2) of the NLC.

[26] Once the private caveat is entered, it acts as a temporary
G injunction preventing dealings from being registered and it serves also in preventing a lien-holder's caveat from being entered. I am of the considered view that the Registrar does not have a quasi-judicial role to play in either the entry or the retention of the private caveat because such a role belongs to the domain of the
H court.

[27] Under s. 326 of the NLC, a challenge can be mounted against the entry of a private caveat by a party whose land or interest therein is affected by the private caveat and who applies
I to the Registrar for its removal. And the private caveat may be removed by virtue of this application or, alternatively, the caveator may seek the assistance of the court to extend the private caveat just like what the appellant here did.

[28] Incidentally, a challenge may also be advanced by the applicant by way of an application to the court for the removal of the private caveat by a party "aggrieved" by its entry under s. 327 of the NLC.

[29] And when the court is called upon to determine whether the private caveat should remain or not, the court will test the underlying circumstances surrounding the case to determine whether the interest or claim to an interest was "caveatable".

[30] Lord Diplock in delivering the opinion of the Privy Council in *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 1 LNS 135; [1976] 2 MLJ 44, at p. 46, described the purpose of a private caveat in this way:

> The purposes of a private caveat is to preserve the *status quo* pending the taking of timeous steps by the applicant to enforce his claim to an interest in land by proceedings in the courts.

[31] Again, Lord Diplock in delivering the judgment of the Judicial Committee in *Eng Mee Yong & Ors v. Letchumanan* [1979] [1979] 1 LNS 18; 2 MLJ 212, at p. 214, aptly said:

> The system of private caveats is substituted for the equitable doctrine of notice in English land law. By section 322(2) the effect of entry of a caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. This is a very grave curtailment of the rights of the proprietor, yet it can be imposed at the instance of anyone who makes a claim to title to the land, however baseless that claim may turn out to be. By section 324 the Registrar is required to act in an administrative capacity only; he is not concerned with the validity of the claim on which the caveat purports to be based. If the document is in the correct form he must enter the caveat on the register and leave the registered proprietor to secure its removal and to claim compensation from the caveator for any damage he has suffered by reason of the entry of the caveat having been obtained by the caveator without reasonable cause.
>
> The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its corollary that caveats are available, in appropriate cases, for the

A interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved. Nevertheless their Lordships would point out that the issue of a caveat differs from the grant of an interlocutory injunction in that it is issued *ex parte* by the Registrar acting in an administrative capacity without the intervention of the court and is wholly unsupported by any evidence at all. Unless there were some speedy procedure open to the registered proprietor to get the caveat set aside in cases where the caveator's claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya, would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English law.

[32] Now, persons or bodies who wish to enter a private caveat must have a caveatable interest in the land. Section 323 of the NLC is the relevant section to refer to. It enacts as follows:

Applications for entry of private caveats

323. (1) The persons and bodies at whose instance a private caveat may be entered are:

(a) any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

[33] A personal claim which is enforceable only against the registered proprietor but not the land in question, cannot be caveated.

[34] Only claims to interests which have been held to be entitled to caveat would include those which represent claims to "title to, or any registrable interest in alienated land" or claims "to any right to such title or interest".

[35] Section 326 of the NLC allows the registered proprietor of the land or interest to apply to the Registrar for removal of the private caveat. While s. 327 of the NLC allows a "person aggrieved" by the existence of the private caveat to apply to the court for its removal.

[36] In *Eng Mee Yong & Ors v. V Letchumanan (supra)*, Lord Diplock spoke of the rigours of ss. 326 and 327 of the NLC in these trenchant terms (see pp. 214 to 215 of the report):

> Under the National Land Code there are alternative procedures for the removal of a caveat at the instance of the caveatee. Under section 326 the caveatee may apply to the Registrar for its removal and the Registrar, provided he is able to serve the caveator with notice of the application (as he was not in the instant case), is required to remove the caveat from the Register at the expiry of one month from the date of such notice, unless the caveator applies successfully to the court for an extension of the period for which the caveat shall remain on the register.
>
> As was pointed out by the Federal Court in *Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1970] 1 MLJ 145, it is the caveator who is the applicant in proceedings brought under section 326(2), and it is for him to begin and to satisfy the court that there are sufficient grounds in fact and law for continuing the caveat in force after the month has elapsed. This in their Lordships' view is plainly right. What constitute sufficient grounds they will discuss later after examining the alternative procedure open to the caveatee under section 327.
>
> Whereas the procedure under section 326 for obtaining the removal of a caveat is available only to the caveatee, the procedure for applying directly to the court for an order of removal is available not only to the caveatee but also to any other person aggrieved by the existence of the caveat - typically a purchaser to whom the registered proprietor has contracted to sell the land but the sale has not yet been completed by a proper instrument of transfer duly registered. In their Lordships' view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (ie, the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case the caveatee can rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so. So where, as in the instant case, the only parties to an application under section 327 are caveatee and caveator there is no difference between what the caveator must establish to obtain an extension of the caveat under section 326 and what he must establish to defeat the caveatee's application for removal of the caveat under section 327.

[37] Continuing at p. 215 of the report, Lord Diplock had this to say:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under section 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

[38] Under s. 327(1) of the NLC, a private caveat may be removed by the court on the application of any person or body aggrieved by its existence. This sub-section reads as follows:

> 327. (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

[39] A reading of s. 327(1) of the NLC shows that it is not necessary for an applicant to show that he has a registered title or interest affected by the existence of the private caveat. Lord Diplock in *Eng Mee Yong & Ors v. V Letchumanan (supra)* aptly said that the procedure in s. 327(1) of the NLC is available to any person aggrieved by the existence of the private caveat and this is irrespective of whether or not he has a registered title or interest in the land.

[40] Lord Diplock too in *Eng Mee Yong & Ors v. V Letchumanan (supra)* said that where the applicant is the caveatee (that is, the registered proprietor of the land), the onus lies on the caveator to satisfy the court that on the evidence presented to it the private caveat ought to remain pending the trial of the action. And that there is no necessity for the caveatee to first show that he is aggrieved by the existence of the private caveat because the caveatee can rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases. It must be borne in mind that the word "caveatee" was used by Lord Diplock to refer to the registered proprietor of the land because his Lordship there was dealing with an application by the registered co-proprietors for removal of a caveat entered against their land by the respondent.

[41] Here, the respondent as the registered proprietor of the land had applied to the Registrar to remove the private caveat under s. 326 of the NLC and the Registrar had served on the appellant a notice of intended removal in Form 19C. Upon receipt of Form 19C, the appellant applied *ex parte* to the learned High Court judge to extend the private caveat on the project land and his Lordship rightly refused to accede to the appellant's application.

[42] In seeking to extend the private caveat, the appellant proceeded under s. 326(2) of the NLC which reads as follows:

> Removal of private caveats by Registrar
>
> 326. (2) The Court may, on the application of any person or body on whom such a notice has been served under subsection (1A) (and acting, if the circumstances so require, *ex parte)*, from time to time extend the said period of two months; and the Registrar, on being duly served with an order of the Court under this subsection, shall make an endorsement on the register document of title of the date of service on him of the order and of the period of the extension, and shall sign and seal the endorsement.

[43] Now, the three stages of inquiry set out by Gopal Sri Ram JCA (later FCJ) in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520, CA should be referred to. At p. 535 of the report, this was what his Lordship said:

> In my judgment, there are three stages through which an inquiry of this nature must go. The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then *cadit quaestio*, and the caveat must be removed without the necessity of going any further.

[44] At p. 536 of the report, his Lordship in *Luggage Distributors* had this to say:

> The matter does not come to an end once the caveator satisfies the Court that his claim as expressed in the application in Form 19B amounts in law to a caveatable interest. He must go on to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second stage. The degree of proof that has to be offered will, of course, vary from case to case.

[45] And, finally, at p. 537 of the report in *Luggage Distributors*, his Lordship had this to say:

> The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong (supra)* as 'the balance of convenience'. As to the matters that go to determine in which direction the balance should tilt, these have already been set out in such clear terms by Lord Diplock in *Eng Mee Yong* that mere repetition becomes unnecessary.
>
> It is only upon satisfying these three stages of curial scrutiny that a caveat may be permitted to remain. That this should be so is only logical; for it is a serious matter to caveat a person's property, and unless a case is properly made out, a caveat ought not be permitted to remain on the register a moment longer than is absolutely necessary.

[46] The same learned judge writing for this court in *Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka MRI Murugappa Chettiar, Simati) v. Lee Teck Mook* [1995] 2 CLJ 545, CA, had this to say at p. 550 of the report:

> The principles formulated in *Luggage Distributors (supra)* as applied to the present appeal require an investigation into the following matters. First, whether the respondent, on the material set out by him in his application under s. 323(1) of the Code, has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned Judicial Commissioner in support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the Register pending the disposal of his suit.

[47] It is now ideal, at this juncture, to have sight of the appellant's statutory declaration. This can be seen at p. 260 of the appeal record at Jilid 2 and it was worded in this fashion:

> Surat Akuan
>
> Kami, Mexaland Development Sdn Bhd (No. Syarikat: 687973-K) yang beralamat di No. 21G & 25-2, Jalan Bandar 14, Pusat Bandar Puchong, 47100 Puchong, Selangor Darul Ehsan (selepas ini dirujuk sebagai 'Pembeli') dengan sesungguh dan sebenarnya menyatakan seperti berikut:

(a) Kami adalah Pengurus Projek yang dilantik di bawah satu Perjanjian 'Joint Venture cum Project Management Agreement' ('Perjanjian Joint Venture') yang ditandatangani di antara kami, Score Option Sdn Bhd (550356-V) dan Mexaland Sdn Bhd (638830-A) bertarikh 22.2.2006 bagi sebahagian hartanah yang dipegang di bawah HSD 112510, PT 2063 di Mukim dan Daerah Petaling, Negeri Selangor Darul Ehsan (selepas ini dirujuk sebagai 'Hartanah Tersebut'). A B

(b) Kami mempunyai kepentingan dalam hartanah tersebut. Menurut Klausa 6 Perjanjian Joint Venture tersebut, kami juga dibenarkan untuk memasukkan suatu kaveat persendirian terhadap tanah tersebut bagi melindungi kepentingan kami ke atas Projek yang disebut di atas. C

2. Sebarang pernyataan yang terkandung di atas mengenai Hartanah Tersebut adalah benar. D

3. Kami membuat akuan ini dengan kepercayaan bahawa apa-apa yang terkandung di dalamnya adalah benar serta menurut Akta Akuan Berkanun, 1960.

[48] It merely stated that the appellant had a right to lodge the E private caveat on the project land on the basis that the appellant had entered a JVPM agreement with the respondent and that the entry of the private caveat was made pursuant to clause 6.1 of the JVPM agreement. I have reproduced cl. 6.1 of the JVPM agreement in the early part of this judgment and that clause F stipulates that the appellant is entitled to register a private caveat for the purpose of protecting the appellant's interest in the project land.

[49] It is part and parcel of my judgment that the appellant G does not possess any caveatable interest which entitles it to enter the private caveat on the project land for the following reasons:

(a) that the JVPM agreement does not confer any caveatable interest in favour of the appellant;

H

(b) that the appellant's interest is purely monetary in nature; and

(c) that the existence of cl. 6.1 of the JVPM agreement allowing the appellant to register a private caveat on the project land does not in itself confer a caveatable interest in favour of the appellant. I

[50] It is wishful thinking on the part of the appellant that the JVPM agreement standing in isolation would confer caveatable interest. Way back in 2003, this court in *Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor* [2003] 3 CLJ 339, at p. 343, speaking through Gopal Sri Ram JCA (later FCJ) said:

> It is established by authority that a joint venture agreement to develop land and to share proceeds of the development does not confer a caveatable interest even if the agreement itself expressly provides for entry of a caveat (see *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441 per Hashim Yeop A Sani SCJ).

[51] It is quite apparent that the appellant's interest is entirely monetary in nature. The JVPM agreement bears testimony to this.

[52] The appellant's claim in the civil suit revolves, *inter alia*, on damages arising purportedly out of the alleged breaches of the terms and conditions of the JVPM agreement. The appellant also seeks, in the civil suit, specific performance of the JVPM agreement.

[53] In seeking for an order of specific performance, the appellant shows its clear intention to proceed with the development of the project land. It can never be denied that the appellant's interest in the event the development of the project land was to be continued pursuant to the JVPM agreement would be centred on the profits to be gained from the development. The appellant seeks monetary compensation in its civil suit. Everything revolves on money.

[54] Siti Norma Yaakob JCA (later Chief Judge of Malaya) speaking for this court in *Trans-Summit Sdn Bhd v. Chun Nyook Lin (P)* [1996] 3 CLJ 502, aptly said at p. 506 of the report:

> In the proceedings before us, what interest does the respondent possess? It is not in the land. That has already been validly sold. Her interest really lies in the profits that her company hopes to gain from the joint venture agreement with the appellant, which is being challenged by the appellant. The civil suit testifies to this. As her interest is only monetary in nature, she has therefore no caveatable interest over the land. She cannot continue to have the private caveat lodged by her extended until after the disposal of the civil suit.

[55] *Trans-Summit Sdn Bhd* concerned an appeal against the decision of the learned judge in refusing to remove a caveat lodged by the respondent on the ground that the respondent had a caveatable interest in the land in question. The facts showed that the appellant as the owner of the land wanted to develop the land and for that purpose had allegedly promised to enter into a joint-venture agreement with the respondent's company (Airport Auto) to undertake the project. The appellant had backed out from the agreement and the respondent, thereupon, filed a suit in the High Court seeking for a declaration, *inter alia*, that there existed between them a valid and enforceable joint venture agreement over the land. The respondent contended that by virtue of the prayer in the civil suit, she had a caveatable interest over the land and she relied on the Supreme Court decision in *J Raju M Kerpaya @ Jayaraman M Kerpaya v. Kwong Yik Bank Berhad & Anor* [1994] 2 CLJ 695.

[56] Her Ladyship held that the respondent's argument that her company's claim for a declaratory relief in the civil suit was sufficient to clothe her with the necessary interest entitling her to validly caveat the land was unsustainable. Her Ladyship also held that a thorough reading of *Raju*'s case shows that not all declaratory reliefs can empower a person like the respondent to lodge a private caveat to protect her interest. And what the Supreme Court stated in *Raju*'s case is that only declaratory relief affecting rights under the NLC can justify a party entering a caveat to protect his land.

[57] Her Ladyship also held that the respondent's interest lies not in the land but in the profits that her company hopes to gain from the joint venture agreement with the appellant which is being challenged by the latter. And as the respondent's interest is only monetary in nature she has no caveatable interest in the land. Consequently, her Ladyship held that the respondent was not entitled to have the private caveat lodged by her extended until after the disposal of the civil suit.

[58] Her Ladyship also held that on the facts, the balance of convenience tilted in favour of the appellant being given a free hand to continue with the development of the land. And if it later transpires that Airport Auto succeeds in the civil suit, it can be adequately compensated with damages.

[59] It is always prudent when faced with the question of whether any person or body is entitled to enter a private caveat, reference to s. 323 of the NLC should be referred to. That section is the guiding force to determine whether the private caveat ought to be lodged. Not every Tom, Dick or Harry can lodge a private caveat. The guidelines in s. 323 of the NLC must be dutifully adhered to.

[60] Monetary interest cannot give rise to a caveatable interest. In *Tan Geok Teck & Yang Lain lwn. Upaya Kelana (M) Sdn Bhd* [2007] 3 CLJ 312, Mokhtar Sidin JCA speaking for this court had this to say at pp. 329 to 330:

> [14] ... Di dalam kes ini sekarang, alasan yang diberikan oleh defendan adalah semata-mata kepentingan kewangan. Plaintif di dalam afidavitnya menyatakan bahawa plaintif sedia memulangkan kesemua wang yang dinyatakan di dalam borang permohonan memasukkan kaveat tersebut, tetapi defendan enggan menerimanya. Sebaliknya, defendan menuntut pampasan sebanyak RM600,000. Defendan tidak menafikan perkara ini. Sebagaimana yang saya katakan di atas, defendan tidak ada memfailkan apa-apa tindakan terhadap plaintif dan dengan itu tidak ada isu yang serius untuk dibicarakan. Sekiranya defendan ada memfailkan tindakan ke atas plaintif untuk mendapatkan balik wang yang dinyatakan di dalam borang permohonan untuk memasukkan kaveat, defendan boleh diberi pampasan dengan gantirugi sekiranya ia berjaya dalam guamannya itu.
>
> [15] Di atas sebab-sebab yang dinyatakan di atas, saya berpendapat bahawa YA Hakim perbicaraan telah terkilaf apabila ia tidak membatalkan kaveat yang dimasukkan oleh defendan. Dengan itu juga kami telah membenarkan rayuan oleh perayu/plaintif dengan kos di mahkamah ini dan di Mahkamah Tinggi. Kaveat yang dimasukkan oleh responden/defendan hendaklah dibatalkan.

[61] And what is more certain is this. That the existence of a clause allowing for the entry of the private caveat in the JVPM agreement does not in itself confer a caveatable interest. The appellant heavily relies on cl. 6.1 of the JVPM agreement to drive home the point that it is entitled to enter the private caveat on the project land. This issue has been put to rest by the judgment of Hashim Yeop A. Sani FJ, a brilliant judge of his time, in the case of *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441, FC. In that case, his Lordship had this to say at pp. 444 to 445:

As can be seen in his own statement when lodging the caveat the sole basis of his claim of right to lodge the caveat was Clause 4(a) of the deed of assignment. Clause 4(a) reads as follows:

> The Parties hereto are aware that the Second Party will charge the whole of the said land to Messrs Hong Leong Finance Bhd. of Bangunan Hong Leong, 117 Jalan Bandar Kuala Lumpur for the sum of RM1,000,000 (Ringgit One Million only) upon its transfer to the Second Party by the Vendor and the Parties hereto have agreed that the Vendor hereby waives the MPI Guarantee declared in Clause 8 of the said Agreement and shall *in lieu* thereof:
>
> (a) Lodge a Private Caveat against the said land being CT 4876 Lot 3 s. 20 Town of Kuantan to protect his interest.

It is clear in our view that the 'interest' referred to in Clause 4(a) is the unpaid balance of the purchase price. Based on the affidavits and Clause 2(a) of the sale agreement relating to refundment there would seem to be a dispute as to whether upon computation according to the terms of the main agreement there was any balance of the purchase price at all. The appellant said there was but the company said there was not and according to the respondent money was in fact due from the appellant according to the computation.

The expression 'interest' in the National Land Code was examined by the Privy Council in *Registrar of Titles, Johore v. Temenggong Securities Ltd.* [1976] 2 MLJ 44. An unsecured civil debt is a mere personal claim and did not come within the meaning of 'interest' in s. 320(1) of the National Land Code. Section 320 deals with circumstances in which the Registrar's caveat may be entered. The interest referred to in s. 323(1) of the Code is interest as envisaged in the Code. Lord Diplock in *Temenggong Securities Ltd.* said at p. 47:

> 'The expression 'interest' is used in many sections throughout the Code apart from s. 320 and in none of them to which their Lordships' attention has been drawn can it be plausibly suggested that it bears any wider meaning than an interest in land of a kind which is recognised by the Code as being either registrable or otherwise entitled to protection'.

[62] Continuing at p. 445, his Lordship Hashim Yeop A Sani FJ aptly said:

> Thus it is plain that the appellant claimed to have the right to lodge the caveat but based on Clause 4(a) of the deed of assignment. It is also plain that this was a contractual right applicable only when purchase price is not fully paid. But this alone cannot create a caveatable interest in the land. The contractual provision does not create an interest within the meaning of s. 323 of the National Land Code. Interests which are protectable by caveat are only interests recognised by the Code. The contractual provision does not amount to an equitable or other interest sufficient to support a caveat. Section 323(1) of the National Land Code sets out the classes of persons who may lodge a private caveat. They are person or body claiming title to any alienated land; or claiming any registrable interest in any alienated land; or claiming any right to such title of interest; and includes person or body claiming to be beneficially entitled under any trust affecting any such land or interest. The words 'any right to such title or interest' may be wide enough to allow rights arising under a contract for registrable dealing to be protected by a caveat but they are not wide enough to cover mere personal rights as distinguished from rights relating to land. See also *David Wong: Land Tenure in the Malay States* - pp. 416-435.
>
> At the heart of this argument lies the very essence of the Torrens system. The indefeasibility of title means that the title can only be challenged under s. 340(2) of the National Land Code; and only an interest in land recognised under s. 323 of the National Land Code can support a caveat.

[63] The sum total of it all would be this. That the existence of cl. 6.1 of the JVPM agreement which provides for the entry of the private caveat by the appellant is not sufficient to amount to a caveatable interest for the simple reason that it does not create any interest within the meaning of s. 323 of the NLC.

[64] As demonstrated, the Federal Court case of *Wong Kuan Tan v. Gambut Development Sdn Bhd (supra)* was vigorously applied by this court in *Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor (supra)*.

[65] I need to refer to the case of *Zemine Development Sdn Bhd v. Hong Kong Realty Sdn Bhd* [2009] 5 CLJ 218, a decision of another coram of this court. The facts may be stated as follows. The appellant in that case as the registered proprietor of a piece of land entered into a development agreement with the respondent on 9 May 1998 for the development of the said land. Under the

development agreement, residential and commercial buildings will be constructed on the said land. Under the development agreement, the appellant held 20% of the residential and commercial buildings while the respondent held the remaining 80%. By cl. 17(1) of the development agreement, the respondent was conferred the right to lodge a private caveat against the said land and the respondent did just that on 23 June 1998. Disputes between the parties surfaced and eventually the development agreement was terminated. The respondent took out a writ action against the appellant for specific performance and the trial was still pending before the High Court in Sibu, Sarawak.

[66] Applying *Mohamed Oki & Anor v. Lau Hieng Ming & Ors* [1980] 1 LNS 153, a decision of Tan Chiaw Tong J, which adopted the decisions of *Nanyang Development (1966) Sdn Bhd v. How Swee Poh (supra)* and *Eng Mee Yong & Ors v. V Letchumanan (supra)* wherein the provisions of s. 327 of the NLC were said to be substantially similar to those in s. 177 of the Sarawak Land Code (Cap 81), the learned Court of Appeal judge agreed with the decision of his Lordship Tan Chiaw Tong J bearing in mind that the appeal also concerned s. 177 of the Sarawak Land Code (Cap 81). The learned Court of Appeal judge then applied *Eng Mee Yong*'s case when he said (see p. 224 of the report):

> Applying the test in *Eng Mee Yong*'s case, the onus is upon the respondent, as caveator, to satisfy the court that on the evidence presented to it his claim to an interest in the property placed under caveat does raise a serious question to be tried; and having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action by preventing the caveatee from disposing of his land to some third party.

[67] Finally, the learned Court of Appeal judge in *Zemine*'s case said at p. 224 of the report:

> Additionally it is pertinent at this stage to consider the provisions of s. 173 of the Sarawak Land Code (Cap. 81) which deals with 'Caveat against dealing'. Section 173 stipulates:
>
> 173. Any person:
>
> (a) claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Code by virtue of any unregistered agreement or other instrument or any transmission, or of any trust express or implied or otherwise howsoever, ...

A (b) ...

(c) ...

may at any time lodge with the registrar a caveat in Form O in the First Schedule.

B

Therefore it is the considered view of this court that there is merit in the finding of the learned High Court Judge that the entitlement of 80% of the subdivided lots of the said land constitutes the respondent's beneficial interest in the said land because of the words 'by virtue of any unregistered agreement of other C instrument' appearing in s. 173 thereof are wide enough to encompass the Development Agreement.

[68] With the greatest of respect, *Zemine*'s case was decided on 13 April 2009 without taking into account the case of *Perbadanan* D *Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor (supra)* which was decided on 21 May 2003 and the vintage Federal Court case of *Wong Kuan Tan v. Gambut Development Sdn Bhd (supra)* which was decided on 30 April 1984. Perhaps these two cases were not brought to the attention of the learned Court E of Appeal judge when his Lordship deliberated the matter in the *Zemine*'s case.

[69] The decision of the Federal Court carries with it the doctrine of precedent or of *stare decisis*. What it amounts to is F this. That the decision of a higher court acts as a binding authority on a lower court. *Glanville Williams in Learning the Law*, 9th edn, 1973, had this to say about the doctrine:

What the doctrine of precedent declares is that cases must be decided the same way when their material facts are the same. G Obviously it does not require that all the facts should be the same. We know that in the flux of life all the facts of a case will never recur, but the legally material facts may recur and it is with these that the doctrine is concerned.

[70] I am of the considered view that the doctrine of precedent H or of *stare decisis* is related to the dispensation of justice and fairplay. Fairness is the name of the game. William K Frankena, *Ethics*, second edition (Englewood Cliffs, NJ: Prentice - Hall Inc., 1973), at p. 49, had this to say:

I The paradigm case of injustice is that in which there are two similar individuals in similar circumstances and one of them is treated better or worse than the other. In this case, the cry of injustice rightly goes up against the responsible agent or group;

and unless that agent or group can establish that there is some relevant dissimilarity after all between the individuals concerned and their circumstances, he or they will be guilty as charged.

[71] It is always desirable to have stability and certainty in the law. Litigants expect that, on the same facts, the decisions would be the same. Legal practitioners too welcome adherence to precedent because they can advice their clients with ease knowing fully well that the courts would adhere to the doctrine of *stare decisis*.

[72] The notions of justice and fairness demand that adherence to precedent should be put to the forefront. No judge is entitled to decide a case without regard to the principles laid down by the superior courts in previous similar cases. If the law is uncertain, the administration of justice would be in a turmoil. Investors will shy away and go elsewhere.

[73] With respect, it is intellectually dishonest for a judge to decide a case by ignoring a precedent decision from the superior court. It must be borne in mind that a precedent decision will always stand for the legal proposition enunciated by the superior court. A precedent decision will always articulate the legal proposition for which it has been cited. A precedent decision should not be curtailed because the *ratio decidendi* is binding and cannot be ignored. Decisions of eminent judges from the superior courts must be respected and applied especially when the facts are on all fours with the case under adjudication.

[74] Be that as it may, the case of *Kamra Jaya Sdn Bhd v. Mulia Cemerlang Sdn Bhd* [2007] 3 CLJ 93 emanated from the High Court and was decided on 13 February 2007. It also concerned a joint venture agreement between the registered owner of the land with another party to develop the land. And the joint venture agreement contained a clause expressly providing the defendant the right to enter the private caveat. The learned High Court judge gave effect to that clause by stating that the plaintiff had expressly agreed to incorporate that clause into the joint venture agreement. Again, the Court of Appeal case of *Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor (supra)* and the Federal Court case of *Wong Kuan Tan v. Gambut Development Sdn Bhd (supra)* were not considered by the learned High Court judge in adjudicating the case.

[75] It is germane to mention that the following cases followed the decision of the Court of Appeal in the case of *Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor (supra)*:

(a) *SAP Langkawi Development Sdn Bhd lwn. Koperasi Pegawai-Pegawai Tadbir Negeri Kedah Darul Aman Berhad* [2009] 1 LNS 571, a High Court decision;

(b) *Ganding Maju Sdn Bhd v. KS Property Development Sdn Bhd; Affin-ACF Finance Bhd (Intervener)* [2008] 7 CLJ 227, a High Court decision; and

(c) *Tan Geok Teck & Yang Lain lwn. Upaya Kelana (M) Sdn Bhd (supra)*, a decision from the Court of Appeal.

[76] In considering whether the private caveat should remain on the register document of title or be removed, the appellant caveator must pass the three stages of inquiry:

(i) whether the appellant caveator has disclosed a caveatable interest in its application under s. 323(1) of the NLC;

(ii) if the appellant caveator has established a caveatable interest, then whether the evidence produced in support of its claim disclosed a serious question to be tried; and

(iii) if both questions are resolved in the appellant caveator's favour, then whether the balance of convenience or justice, lies in favour of the private caveat remaining on the register pending the disposal of the suit.

[77] It is my judgment that the existence of the JVPM agreement and in particular cl. 6.1 thereof does not confer on the appellant any caveatable interest and, accordingly, having failed the first stage of the test, it is not necessary for me to consider the other two stages of the test.

[78] It is the submission of the respondent that this court is unable to proceed to consider stage two of the test because the respondent was deprived of the opportunity to file any affidavit in reply. I agree wholeheartedly with this submission.

[79] Another salient fact has been brought to the attention of this court. It is this. That receivers and managers have been appointed for the respondent on 29 January 2010. And the JVPM

agreement would certainly not bind the receivers and managers. That being the case, both the appellant's appeal herein and the civil suit at the High Court are rendered academic. A

[80] For the reasons adumbrated above, the decision of the learned High Court judge should be affirmed. Accordingly, I dismissed the appellant's appeal with costs. This judgment is in favour of the respondent - the registered proprietor of the land. B

Kang Hwee Gee JCA (majority):

[81] This is an appeal against the decision of the High Court in disallowing the appellant's application to extent a caveat which it had lodged pursuant to a Joint Venture cum Project Management Agreement (JVPM Agreement) it entered into with the proprietor of the land Score Option Sdn Bhd (the Land Owner) and another party, Mexaland Sdn Bhd (the Developer) to develop a part of the Land Owner's land into a housing estate. C D

[82] The Land Owner is a subsidiary company of the Mexaland Sdn Bhd and under the JVPM, it was appointed the "Developer" and Score Option, the appellant, the "Project Manager". E

[83] The gross development value (GDV) of the project was fixed by the parties for the purpose of the JVPM Agreement at RM234,184,000. The consideration that the appellant had to pay to the Land Owner and the Developer jointly for its right under the JVPM is a guaranteed sum of not less than RM38 Million or a sum equivalent to percentages of GDV of each type of buildings to be built by the appellant whichever is higher, the details and manner of payments of which are provided under cl. 4 of the JVPM. F G

[84] Under cl. 2A and cl. 7B.1(e) and (n), for the purpose of undertaking the development, the appellant was granted physical possession of the portion of the land to be developed and the exclusive right to manage the development including the right to conduct preparatory development works, applying for building plan approval, and the right to sell the units constructed. H

[85] By cl. 6.1 of the JVPM, the appellant was granted the right to enter a private caveat against the respondent's land which it did on 10 January 2007. I

[86] A serious dispute had since arisen over the development and by a letter dated 8 February 2007, the respondent terminated the JVPM Agreement. Consequently, on 16 May 2007, the appellant filed a suit against the respondent, and the 2nd defendant seeking *inter alia*, some specific injunctive reliefs, a declaration that the termination was wrongful, and specific performance of the JVPM Agreement.

[87] On 21 May 2007, the Registrar of Title, Selangor served on the appellant a notice in Form 19C of the NLC that the caveat would be removed at the expiry of two months from the date of receipt of the notice, unless sooner extended by the High Court pursuant to s. 323 of the Code. The appellant's subsequent application to the High Court to extend the caveat was dismissed; hence this appeal.

[88] The appellant's application was opposed solely on the ground that it had no caveatable interest in the land, its interest being merely on the profits that is to be derived from the joint venture agreement that it entered into with the respondent.

[89] Under s. 323 of the NLC 1965, any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest, may caveat the land.

[90] The appellant in the instant case is not claiming title to the land but merely an interest under the JVPM Agreement.

[91] The law with respect to what interest in land may sustain a caveat is well settled. Only a "registrable interest" can sustain a caveat. This is clear from s. 323(1)(a) itself which speaks only of persons and bodies claiming "any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest".

[92] The learned judge of the High Court was therefore constrained to follow the decision of this court in *Trans-Summit Sdn Bhd v. Chun Nyook Lin (P)* [1996] 3 CLJ 502, wherein Siti Norma Yaakob JCA (as she then was) found on the facts peculiar to that case that:

> the ... interest lies not in the land but in the profits that her company hopes to gain from the joint venture agreement with the appellant which is being challenged by the latter. As her interest

> is only monetary in nature she has no caveatable interest in the land. She is not therefore entitled to have the private caveat lodged ... .

[93] The same sentiment was shared by Gopal Sri Ram JCA (as he then was) in *Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor & Another Appeal* [2003] 3 CLJ 339, in an appeal not specifically on caveats but on the grant of an interlocutory injunction, when he said at 343:

> It is established by authority that a joint venture agreement to develop land and to share proceeds of the development does not confer a caveatable interest even if the agreement itself expressly provides for entry of a caveat.

[94] The learned judge relied on the Federal Court case of *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441, per Hashim Yeop A Sani FJ that:

> Interests which are protectable by caveat are only interests recognised by the Code. The contractual provision does not amount to an equitable or other interest sufficient to support a caveat. Section 323(1) of the National Land Code sets out the classes of persons who may lodge a private caveat. They are person or body claiming title to any alienated land; or claiming any registrable interest in any alienated land; or claiming any right to such title of interest; and includes person or body claiming to be beneficially entitled under any trust affecting any such land or interest. The words "any right to such title or interest" may be wide enough to allow rights arising under a contract for registrable dealing to be protected by a caveat but they are not wide enough to cover mere personal rights as distinguished from rights relating to land.

[95] Reference was made by the Federal Court to David Wong; *Land Tenure in the Malay States* at pp. 416-435 wherein a clear rationale was provided for the decision by the learned author:

> At the heart of this argument lies the very essence of the Torrens System. The indefeasibility of title means that the title can only be challenged under s. 340(2) of the National Land Code; and only an interest in land recognised under s. 323 of the National Land Code can support a caveat.

[96] The rather narrow construction being adopted by our higher courts with respect to "registrable interest" is to be expected. Whereas an interim injunctive relief granted under O. 29 of the RHC is intended to be of general application to protect the

A interest of a party pending the resolution of any dispute, a caveat is intended to protect the Torrens System of registration of dealings in land under the NLC. It is meant to serve and to facilitate only that purpose. As Lord Diplock explained in *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 1 LNS 135:

B

> The National Land Code in its preamble is expressed to be "a law with respect to land tenure, registration of titles relating to land, transfer of land, leases and charges in respect of land, and easements and other rights and interests in land." The expression "interest" is used in many sections throughout the Code apart
C from s. 320 and in none of them to which their Lordships' attention has been drawn can it be plausibly suggested that it bears any wider meaning than an interest in land of a kind which is recognised by the Code as being either registrable or otherwise entitled to protection.
>
D
> These comprise registered titles, registered leases and subleases for three years or more, registered charges and registered easements, short-term tenancies, exempt from registration, liens created by deposit of instruments of transfer and all beneficial interests in land arising under express, constructive or resulting
E trusts.

[97] Lord Diplock was speaking generally of "interests" under the s. 323(1)(a) of the NLC with respect to "any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land ...". But what the
F appellant is claiming in the instant case falls within the ambit of the words "any right to such title or interest" under the same subsection. As to what constitutes "any right to such title or interest" we would accept the following passage (referred to us by
G counsel for the respondent) from *Judith Simhombing The National Land Code: A Commentary* (Issue 21, at p. XXV 486) as correctly stating the law:

> Any lesser interest can be included within the ambit of 'any right to such title or interest'. The interest which can be caveated under
H the heading 'any right to such title or interest' is that of the claimant who has an unregistrable interest, ie, a claim which is not in its present form capable of causing a substantive entry to be made on the register.

I **[98]** Where a caveat entered in Form 19B is stated to be based on a right to a joint venture agreement as in the instant case, in an application to extend the caveat under s. 326(2) of the NLC, it would be necessary to examine that agreement in detail and to

ask the question whether the JVPM Agreement relied upon by the appellant to caveat the land is sufficient to confer upon the appellant a right to a registrable interest in the land or any part thereof.

[99] Now, the JVPM Agreement discloses that for the consideration as stated in cl. 4, the appellant was given physical possession of the land and a free hand to develop, manage and sell the property in accordance with the terms stipulated in the agreement.

[100] Under Clause 8.1 the appellant is entitled to:

> to sell, market or otherwise deal with all of the Units at any time as soon as the same is lawful to do so, taking into account the prevailing market condition.

[101] It is clear that what the appellant had acquired under the JVPM Agreement were rights which though not in its present form capable of causing a substantive entry on the register, nevertheless entitled the appellant to claim a "right to such title or interest" in a portion of the respondent's land which gives it the right to "otherwise deal with all of the Units at any time". There is no provision under the agreement that says the appellant cannot hold any of the Units for itself or any compulsion that it must sell all the Units to purchasers. In short, the appellant could at its option acquire a direct proprietary interest or title in any or all of the Units by paying the prevailing market value for each unit. We are therefore bound to agree with the submission of counsel for the appellant that the right it acquired was not merely a right to the profits of the development but a legitimate registrable interest in the land which it can lawfully caveat.

[102] We agree with the submission of counsel for the appellant that the right or interest acquired by the appellant in the instant case is to be distinguished from the right or interest being claimed in the *Trans-Summit* case, where the extension of the caveat applied for was to preserve the caveator's interest in a declaratory order which it had filed in civil suit to declare the joint venture agreement which the land owner had refused to execute valid and enforceable; and where unlike in the instant case no specific proprietary interest in the property was being claimed on the property.

[103] The *Metroway* case on the other hand is a bare restatement of the law on caveatable interest as explained by the Federal Court in *Wong Kuan Tan, supra* which we accept as correct. It is however important to note that what was said in *Metroway* was that "a joint venture agreement to develop land and to share proceeds of the development does not confer a caveatable interest". The judgment did not go so far as saying that all joint venture agreements to develop land do not confer a caveatable interest. The caveator's entitlement to share in the subdivided lot of the land was not an issue in that case.

[104] In our considered view, a joint venture agreement which spells out the caveator's entitlement to the subdivided lots as opposed to merely allowing him a share in the profits of the development would have to be considered in a different light. The purpose or object underlying the NLC would be better served by construing "registrable interest" in s. 323(1)(a) to encompass all interests acquired by the caveator (to use Judith Simhombing's words) "capable of potential registration". Indeed, the Court of Appeal in the more recent case of *Zemine Development Sdn Bhd v. Hong Kong Realty Sdn Bhd* [2009] 5 CLJ 218 had found that the entitlement of 80% of subdivided lots of land in a housing development undertaken by the caveator in an agreement sufficient to constitute a "beneficial interest" in the land under s. 173 of the Sarawak Land Code (Cap. 81) to maintain a caveat against the land being developed.

[105] It is true that a "beneficial interest" under s. 173 of the Sarawak Land Code may be wider than a "registrable interest" under s. 323(1)(a) of the National Land Code, but in our view, a developer's entitlement to a percentage of the land he undertakes to develop should fall within the ambit of "any right to such title or interest" and should be sufficient to clothe him with a "registrable interest" under the NLC to sustain a caveat.

[106] The approach is consistent with the requirement of s. 17A of the Interpretation Act 1967 which provides that:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[107] The purpose of the NLC is to provide an orderly means of transfer of land or an interest in land by the process of registration. A liberal construction would allow converted and subdivided land in a development to be registered by the ultimate purchaser. A narrow and restrictive construction on the other hand would impede the means by which property is acquired in a housing development by buyers at large.

[108] For the foregoing reasons, we would allow the appeal with costs.

[109] Abdul Malik bin Ishak JCA, the other member of the panel however does not share our view and would write a separate judgment.